

STATE OF CONNECTICUT

DEPARTMENT OF PUBLIC UTILITY CONTROL

PETITION OF GEMINI NETWORKS CT, : DOCKET NO. 03-01-02
INC. FOR A DECLARATORY RULING :
REGARDING THE SOUTHERN NEW :
ENGLAND TELEPHONE COMPANY'S :
UNBUNDLED NETWORK ELEMENTS : JANUARY 21, 2003

MOTION OF
THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY
TO DISMISS THE PETITION FILED BY GEMINI NETWORKS CT, INC.
OR, IN THE ALTERNATIVE,
MOTION TO STAY AND/OR BIFURCATE ISSUES AND
REQUEST FOR PROCEDURAL ORDER

THE SOUTHERN NEW ENGLAND
TELEPHONE COMPANY

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****** PUBLIC VERSION ******

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INTRODUCTION

The Southern New England Telephone Company ("Telco") herein files with the Department of Public Utility Control ("Department") its Motion to Dismiss the Petition filed on January 2, 2003 by Gemini Networks CT, Inc. ("Gemini") or, in the alternative, Motion to Stay and/or Bifurcate Issues and Request for Procedural Order. In its Petition, Gemini asks the Department to: (1) declare that the "entire" Hybrid Fiber Coax ("HFC") network formerly leased by SNET Personal Vision, Inc. ("SPV") is subject to unbundling and tariffing as unbundled network elements ("UNEs") pursuant to Connecticut General Statutes ("Conn. Gen. Stat.") §16-247b(a); (2) initiate an expedited cost of service proceeding to determine the rates at which such UNEs will be offered pursuant to Conn. Gen. Stat. §16-247b(b), and (3) order the Telco to provide an immediate inventory of the remaining HFC plant, including the condition of such plant and an itemized list of any portions of the plant previously disposed of.¹

Gemini's Petition should be dismissed on the grounds that: (1) the Petition is an untimely request for arbitration pursuant to §252 of the Telecommunications Act of 1996 ("Act")² and does not otherwise comply with the requirements of §252; (2) the Petition is inadequate on its face to apprise the Telco and Department of the relief it is seeking in that Gemini fails to identify the specific features or functions of the HFC network that it seeks to unbundle; (3) the Petition is moot as it relates to the HFC fiber, as spare fiber is already available to Gemini as the dark fiber UNE; (4) the Petition is moot to the extent that Gemini is seeking transport similar to that provided to SPV in Tiers' One and Two of

¹ See Gemini Petition at 11

² Pub. L. No. 104-104, 110 Stat. 56 (1996) codified throughout 47 U.S.C.

the HFC network because Gemini can obtain the same transport under the same terms and conditions provided to SPV pursuant to the Telco's FCC Tariff No. 39; and (5) the Department has no jurisdiction over the coaxial distribution facilities in Tier Three as they were not and are not used to provide telecommunications and, therefore, are not subject to unbundling pursuant to §251(c)(3) of the Act, Conn. Gen. Stat. §247b(a), or any other federal or state law.

In the alternative, Gemini's Petition should be stayed pending the Federal Communications Commission's ("FCC") decision in the *Triennial Review Proceeding*.³

To the extent that the Department decides not to dismiss and/or stay the Petition, the Department should issue a procedural order to: (1) require Gemini to amend the Petition to identify (a) the features and/or functions of the HFC network that it seeks to unbundle, (b) how the requested UNE will be used for interconnection and/or access to the local telecommunications network, and (c) why the existing UNEs offered by the Telco do not satisfy Gemini's needs; (2) bifurcate the proceedings into two phases with only the legal issues addressed in phase one and Gemini's request for a cost study and inventory addressed in phase two, (3) order that phase one, which only addresses legal issues, does not require any discovery or hearings, but will be resolved based on briefs submitted by the parties; (4) if any discovery is permitted in phase one, limit discovery to information specifically required to resolve the legal issues; and (5) deny Gemini's

³ See CC Docket No. 01-339, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 96-98, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 98-147, *Deployment of Wireline Services Offering Advanced Telecommunications Capability* ("Triennial Review Proceeding" or "Triennial Review")

request for any inventory in phase one as unnecessary to the resolution of the legal issues of whether unbundling is required, deferring such discovery until phase two.

I. BACKGROUND

While Gemini makes much of the Telco's original intent to build out the HFC network to provide ubiquitous full service telephony, data and cable, that intent is irrelevant in light of superceding facts that required the Telco to abandon its plans to use the HFC network for telephony. Gemini's emphasis on the original or proposed design of the HFC network or the original intent or proposed use is misplaced and irrelevant to the legal issues presented.⁴ It is the Telco's actual use, or in this case the lack of use as previously determined by this Department, of portions of the HFC plant in its network that control the Department's determination of whether it has jurisdiction in this matter.

The history of the Telco's ownership and construction of the HFC network, and its use by SPV, is well known to the Department.⁵ Briefly, in 1992, the Telco began to analyze how it could reduce costs to maintain and modernize its copper distribution telephony plant. In 1996, the Telco proposed to participate in the video services marketplace and committed, through SPV, to compete with incumbent cable operators

⁴ Gemini Petition at 3-4

⁵ See generally, Docket No. 96-01-24, *Application of SNET Personal Vision for a Certificate of Public Convenience and Necessity to Provide Community Antenna Television Service* ("Franchise Application Proceeding"), Decision, September 25, 1996 ("Franchise Application Decision"); Docket No. 99-04-02, *Application of SNET Personal Vision, Inc. to Modify its Franchise Agreement* ("Franchise Modification Proceeding"), and Docket No. 00-08-14, *Application of Southern New England Telecommunications Corporation and SNET Personal Vision, Inc. to Relinquish SNET Personal Vision, Inc.'s Certificate of Public Convenience and Necessity* ("Franchise Relinquishment Proceeding"), Decision, March 14, 2001 ("Franchise Relinquishment Decision"). See also Docket No. 95-06-17, *Application of The Southern New England Telephone Company for Approval to Offer Unbundled Loops, Ports and Associated Interconnection Arrangements*, Decision, December 20, 1995 (discussing the Telco's development and cost allocation of the HFC network); and *New England Cable Television Association, Inc. v. Department of Public Utility Control*, No. CV 970571302, 1998 WL 481744 at * 6-7 (Conn. Super. Aug. 4, 1998 (McWeeny, J.)) (reviewing several Department Decisions concerning the Telco's HFC network).

across the entire State of Connecticut using HFC technology to deliver ubiquitous, full service telephony, data and community antenna television ("CATV" or cable) service.⁶ The Telco sought to construct a network that would provide cost efficiencies and enable competitively priced delivery of a full product line, including information, communication and entertainment.⁷ Beginning in 1998, however, the Telco expressed concerns regarding its continued commitment to CATV service because of HFC telephony technology changes,⁸ but expressed its willingness to maintain SPV's franchise until at least October 2000.⁹ In August 2000, the Telco and SPV petitioned the Department to relinquish SPV's Certificate of Public Convenience and Necessity ("CPCN") and withdraw from the CATV market in Connecticut on the grounds that the Telco had abandoned HFC as a replacement strategy for its copper network because it was unsuitable for delivering ubiquitous, full service telephony and that SPV could not financially support the continued deployment of a *video-only* HFC network.¹⁰ The Department granted the request

Despite the initial plans, the HFC network was never equipped or built out to provide telecommunications services due to changed circumstances that made HFC unsuitable to support full service telephony. The reasons for the Telco's abandonment of its original intent to use the HFC network for telephony are set forth in detail in the

⁶ See *Franchise Application Decision*.

⁷ *Franchise Modification Proceeding*, Application, April 1, 1999, at 7

⁸ See Docket No 98-02-20, *Joint Application of SBC Communications Inc and Southern New England Telecommunications Corporation for Approval of a Change of Control*, Decision, September 2, 1998 ("*Merger Decision*"), at 14

⁹ See *Merger Decision* at 48

¹⁰ *Franchise Relinquishment Proceeding*, Application, August 11, 2002, at 11-12.

Department's *Franchise Relinquishment Decision*. These reasons included withdrawal of the major manufacturers and suppliers of HFC telephony components, and technological and economical shortcomings of HFC for a full service telephone network.¹¹ As a result of these changes, the Telco never equipped or used the coaxial distribution facilities to provide telecommunications services other than a trial of 2,000 volunteers in Stamford.¹²

In granting SPV's request to relinquish its CPCN and CATV franchise, the Department acknowledged that the coaxial distribution plant was not used for telecommunications. In order to comply with the FCC's fully allocated costing concept specified in Accounting Safeguard Order 96-150, and to avoid cross-subsidy by the telephone subscribers of the cable franchise, the Telco changed the Shared Service Agreement with SPV to allocate network costs 85% to SPV and 15% to the Telco, rather than the 50/50 allocation that had been used historically. This approved allocation reflected a [BEGIN TELCO PARA. 2 PROPRIETARY] [END TELCO PARA. 2 PROPRIETARY] assignment of the coaxial distribution plant to SPV.¹³ The Department acknowledged that the Telco was required to change the Shared Service Agreement allocation to comply with the FCC's prescribed fully allocated costing concept.¹⁴

¹¹ *Franchise Relinquishment Decision* at 6-9

¹² This trial was terminated in early 1997 and all equipment in Tier Three used to provide telecommunications services for the limited trial were removed. In February 1997, the National Electric Safety Code ("NESC") standards subcommittee denied the Telco's June 1996 request for a modification to allow placement of an independent power supply source as part of the fiber strand in the "communications gain" on telephone poles. This power supply was necessary for backup power for the telecommunications services. As a result of that ruling, the trial of telecommunications services was terminated. *Franchise Modification Proceeding*, Response to Interrogatory CATV-14, May 19, 1999.

¹³ *Franchise Relinquishment Proceeding*, Late-Filed Exhibit No. 8, Att. A, Dec. 1, 2000

¹⁴ *Franchise Relinquishment Decision* at 18

Pursuant to the Department's authorization to SPV to withdraw from the CATV market, the Telco filed a disposition plan. This plan, subsequently approved by the Department,¹⁵ identified the SPV assets and portions of the HFC network used solely for CATV services that would be disposed.

[BEGIN GEMINI PARA. 2 PROPRIETARY]

[END GEMINI PARA. 2 PROPRIETARY]

¹⁵ *Franchise Relinquishment Proceeding*, Department Letter, May 21, 2001

II. THE PETITION SHOULD BE DISMISSED

A. Granting Gemini's Petition Would Be Unlawful As Inconsistent With Federal Law.

The Department should dismiss Gemini's Petition as inconsistent with federal law. As a preliminary matter, it is clear that state law in this area has been preempted as a result of federal legislative and administrative action. Certainly after *USTA*,¹⁶ it is clear that the FCC's new unbundling rules (and its decisions about what network elements may be unbundled under those rules) will need to incorporate a meaningful limiting impairment standard "rationally related to the goals of the Act."¹⁷

The Supreme Court and federal Courts of Appeals have made it clear that state commission orders must be consistent with the Act, federal court decisions and FCC regulations interpreting the Act.¹⁸ The Act requires the FCC – and only the FCC – to determine the category of network elements that must be unbundled by applying the "necessary" and "impair" standards. *See* 47 U.S.C. §251(d)(2).¹⁹ State law, therefore, cannot authorize unbundling decisions that conflict with the federal requirements. Conn. Gen. §16-247b(a) expressly recognizes the Department's limited authority.

In upholding the FCC's jurisdictional authority to make rules governing matters to which the Act applies, the Supreme Court made clear that:

[T]he question . . . is not whether the Federal Government has taken the regulation of local telecommunications

¹⁶ *United States Telecom Association, et al v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*")

¹⁷ *See, e.g., AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999) ("*Iowa Util. Bd.*"), at 388; *decision on remand, Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *aff'd in part, rev'd in part sub nom Verizon Communications, Inc. v. FCC*, 122 S. Ct. 1646 (2002)

¹⁸ *Id.* at 378, n.6

¹⁹ That is what the FCC is currently undertaking in its *Triennial Review Proceeding*

competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has. The question is whether the state commissions' participation in the administration of the new *federal* regime is to be guided by federal-agency regulations. If there is any "presumption" applicable to this question, it should arise from the fact that a federal program administered by 50 independent state agencies is surpassing strange.

Iowa Utils. Bd., 378, n.6 (emphasis added).

It is clear that the FCC lacks the power to delegate to state commissions the responsibility for determining which network elements must be unbundled. There is nothing in the Act to suggest that the FCC *can* delegate unbundling decisions to the states, because the statute expressly directs *the Federal Communications Commission* to make those decisions. A federal agency may delegate its authority to the states only if Congress intended to permit that result, either explicitly or implicitly. *See, e.g., National Park & Conservation Ass'n v. Stanton*, 54 F. Supp. 2d 7, 18 (D.D.C. 1999); *see also Assiniboine & Sioux Tribes v. Bd. of Oil & Gas Conservation*, 792 F.2d 782, 795 (9th Cir. 1986) ("Without express congressional authorization for a [delegation], we must look to the purpose of the statute to set its parameters."). If the FCC were to "delegate" the hard policy choices underlying these unbundling decisions to 50 independent state commissions, each with its own individual policy preferences, it would undermine the national policy and unlawfully abdicate its responsibility to provide "substance to the 'necessary' and 'impair' requirements." *Iowa Utils. Bd.*, at 392. Indeed, the FCC itself has warned the Supreme Court against proposals to "foist most of [the unbundling decision] on the state commissions in individual arbitration proceedings," given that "Section 251(d)(2) does not, by its terms, even speak to their role " *Iowa Utils. Bd.*, 1998

FCC S. Ct Reply Br. 43. It would be entirely inconsistent with the Act and the FCC's prior statement on the states' role for the Department to accept jurisdiction over Gemini's Petition for unbundling of the HFC network.

The FCC's prior decision *not* to order the unbundling of HFC preempts any state commission decision to require it. The FCC has struck a particular balance of competing interests – and will soon strike a new balance in the *Triennial Review* – that preempts any attempt by a state commission to strike that balance differently. At the very least, in the absence of express authority delegated by the FCC, this Department has no authority to grant Gemini's Petition.

B. Gemini's Petition Is Untimely And Does Not Otherwise Comply With Federal Law

Gemini's Petition must be dismissed as it does not comply with Section 252(b) of the Act. Gemini admits in its Petition that, on June 25, 2002, Gemini requested negotiations with the Telco pursuant to 47 U.S.C. §§251(c)(1), 251(c)(3) *and* 252(a)(1).²⁰ Gemini terminated the negotiations when an impasse was reached on its UNE request. Pursuant to Section 252(b), in order to resolve an impasse reached in a negotiation conducted pursuant to Section 252(a)(1), either party must petition the Department to arbitrate the outstanding issues. Section 252(b)(1) requires that the party requesting arbitration must file the request with the Department “[d]uring the period from the 135th to the 160th day (inclusive)” after the date the Telco received the request for negotiation. Section 252(b)(2)(A) requires that, at the time the petition to arbitrate is submitted to the Department, the petitioning party must submit all relevant documents concerning the

²⁰ Gemini Petition at 10-11

unresolved issues, the position of each of the parties with respect to those issues, and any other issue discussed and resolved by the parties.

Despite admitting that the negotiations were conducted pursuant to Section 252(a)(1), Gemini failed to follow the procedural requirements of Section 252. Gemini failed to file the petition to arbitrate the open issues within the “arbitration window” that extended from November 7, 2002 to December 2, 2002, inclusive. Gemini also ignored its statutory obligation as the petitioning party to submit all relevant documents concerning the unresolved issues, the position of each of the parties with respect to those issues, and any other issue discussed and resolved by the parties. Gemini cannot invoke Section 251 to compel the Telco to negotiate with Gemini and then ignore the dispute resolution established by Congress in Section 252.

Once the parties initiate negotiations pursuant to the Act, if they have unresolved issues they have three options – they can ask the state commission to participate in negotiations as a mediator pursuant to Section 252(a)(2); they can submit any unresolved issues to arbitration pursuant to the procedures set forth in Section 252(b); or they can go their separate ways.²¹ They cannot, as Gemini has attempted, submit the dispute to a state commission outside of the statutory time period or without complying with the procedural requirements of Section 252(b).

The duties imposed on incumbent carriers cannot be divorced from the procedures created to enforce them. A party must, therefore, follow the statutory requirements for invoking state commission review under Section 252. The FCC’s regulations confirm the authority of state commissions to resolve disputes arising out of interconnection

²¹ *Atlantic Alliance Telecommunications, Inc. v. Bell Atlantic*, 2000 U.S. Dist. LEXIS 19649, * (E.D.N.Y. Apr. 17, 2000), at *11-12, and n. 4

negotiations. "As a practical matter, sections 251 and 252 create a time-limited negotiation and arbitration process to ensure that interconnection agreements will be reached between incumbent LECs and telecommunications carriers." *Local Competition Order*, at 16005, ¶1024.²²

The Department expressly recognizes the preeminence of the Act, and its application to Title 16 proceedings, in the standing Procedural Order issued by the Department in arbitration procedures conducted by the Department pursuant to the Act.²³

1.1 Purpose. This Procedural Order establishes the procedures for *dispute resolution* and approval of awards regarding interconnection, service or network elements between [CLEC] and The Southern New England Telephone Company (SNET), pursuant to the Department of Public Utility control's (Department) authority under the Federal Telecommunications Act of 1996, and Title 16 of the Connecticut General Statutes (Conn. Gen. Stat.). *Sections of the Federal Telecommunications Act of 1996 (FTA or Act) define and establish procedures for arbitration procedures conducted by the Department pursuant to the Act* The Act itself imposes strict, compressed timelines for arbitrations conducted under the Act. This procedural order is designed to accommodate the strict timelines under the Act. The Arbitrator shall have specific case management and time management duties to ensure the adherence to the federally mandated timeline.

Department Procedural Order Section 1.1 (emphasis added)

²² First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*"), modified on recon., 11 FCC Rcd 13042 (1996), vacated in part, *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), decision on remand, *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *aff'd in part, rev'd in part sub nom. Verizon Communications Inc. v. FCC*, 122 S. Ct. 1646 (2002).

²³ See, e.g., *CabLight/SNET/Arbitration ADJ VYM, Petition of Cablevision Lightpath-CT, Inc. for Arbitration under the Telecommunications Act of 1996*, Department Procedural Order, July 30, 2002; see also *ATT/SNET Arbitration AJD VYM, Application of AT&T Communications of New England, Inc. for Arbitration of Unresolved Issues with The Southern New England Telephone Company*, Department Procedural Order, June 27, 2001, *Global NAPs/SNET Arbitration AJD sah, Petition of Global NAPs, Inc. for Arbitration*, Department Procedural Order, April 19, 2001.

Conn. Gen. Stat. §16-247b(a) requires that any unbundling be “consistent with federal law.” The Department’s Procedural Order Section 1.1 clearly recognizes that any dispute resolution regarding network elements is subject to the procedures for arbitration established by the Act, including those invoking the Department’s authority under Title 16. Any proceeding to unbundle the Telco’s network under Title 16 is completely subordinate to the requirements of the Act. Because Gemini’s untimely and otherwise incomplete Petition fails to satisfy the requirements of §252(b), the Petition must be dismissed. In the alternative, without waiving its objection to the Department’s jurisdiction over the non-telecommunications facilities, the Telco is willing to permit the Department to act as a mediator pursuant to Section 252(a).

III. GEMINI’S PETITION MUST BE DISMISSED BECAUSE IT IS INADEQUATE ON ITS FACE

Conn. Gen. Stat. §16-247b(a) only authorizes the Department to “initiate a proceeding to unbundle a telephone company’s network, services and functions that *are used to provide telecommunications services* and which the department determines, after notice and a hearing, are in the public interest, *consistent with federal law* and are technically feasible of being tariffed and offered separately or in combinations.” (Emphasis added.) Similarly, federal law defines network elements as a “facility for equipment *used in the provision of telecommunication service*” (Emphasis added.)²⁴

In its Petition, Gemini asks that the “entire HFC network” be unbundled.²⁵ As previously recognized by the Department in prior decisions concerning the HFC network,

²⁴ This definition is adopted in Conn. Gen. Stat. §16-247a(b)(7)

²⁵ Gemini Petition at 11

portions of the HFC network were not “used to provide telecommunications,” including the coaxial distribution plant.²⁶ Therefore, the “entire HFC network” is not subject to unbundling under §251(c)(1) of the Act or Conn. Gen. Stat. §16-247b(a).

[BEGIN GEMINI PARA. 2 PROPRIETARY]

[END GEMINI PARA. 2 PROPRIETARY] The Telco is not asking that Gemini be required to specify the exact location of the requested UNE, such as between Central Office 1 and Central Office 2 or between Pole 1 and End User 1. However, Gemini must identify the features or functions of the HFC network it is requesting with the same degree of specificity as the UNEs already defined by the FCC. Before permitting this matter to proceed, the Department should order Gemini to specify the features or functions it wants unbundled with the same degree of specificity used by the FCC in the descriptions of UNEs in the *Local Competition Order*.

Gemini states that the only relevant inquiry according to FCC rules is whether “the failure to provide access to such . . . element[] would impair the ability for the [CLEC] seeking access to provide the services that it seeks to offer.”²⁷ While the Telco does not agree that this is the only relevant inquiry when determining whether a CLEC is

²⁶ See fnns 13 and 14 *supra*

²⁷ Gemini Petition at 5

entitled to further unbundling, the Telco agrees that it is a relevant inquiry; and, yet, Gemini has deprived the Department of the information necessary to conduct this very inquiry. The Department requires specific information from Gemini before the Department can determine whether it has jurisdiction in the first place or whether the request is moot because the Telco currently provides the requested UNE. The Department needs specific information, not broad demands to “unbundle the entire HFC network” to determine whether the requested UNE meets the statutory requirements of §251 of the Act and Conn. Gen. Stat. §16-247b(a). Without such specificity, the Department and the parties may engage in protracted proceedings only to discover, after wasting everyone’s time and resources, the Department has no authority to order what Gemini seeks. Therefore, the Department should dismiss Gemini’s Petition on the grounds that it is inadequate on its face, or in the alternative, require Gemini to amend the Petition to comply with §252 of the Act and to provide specific information to the Department that defines exactly what features or functions of the Telco’s telecommunications network it needs, and why those needs are not satisfied by existing UNEs to ensure that the request meets the “necessary and impair” standard.

IV. THE PETITION MUST BE DISMISSED AS MOOT TO THE EXTENT THAT IT SEEKS UNBUNDLING OF THE HFC FIBER

Gemini’s request is moot to the extent that it seeks unbundled fiber because the Telco already provides UNEs that satisfy this request.

In its Petition, Gemini states: “[the Telco] must grant the same quality and quantity of access to UNEs to Gemini that it granted to its affiliate SPV.”²⁸ If that is the

²⁸ Gemini Petition at 7

standard that Gemini seeks to apply, the Telco is not required to provide any UNE to Gemini because the Telco provided no UNEs to SPV. As the Department is well aware, Tier One and Tier Two of the HFC network consisted of tariffed transport services over the telecommunications network from the headend to and between the central offices.²⁹ Like any other carrier, Gemini may request these tariffed services.

If Gemini does not want the tariffed service, it is free to resume interconnection negotiations and request dedicated transport³⁰ or dark fiber³¹ between Telco's central offices/switches. If Gemini wants to use fiber in the telecommunications network between the central office and an end user, it is free to resume interconnection negotiations and request the dark fiber UNE. If Gemini wants access from the telecommunications network to an end user, it is free to resume interconnection negotiations and request the loop UNE. Gemini is not free under the Act to come to the Department and demand new UNEs when existing UNEs will satisfy their legitimate telecommunications needs, especially without first negotiating with the Telco and fully complying with §252 of the Act.

V. THE PETITION MUST BE DISMISSED TO THE EXTENT THAT IT SEEKS UNBUNDLING OF THE TELCO'S HFC NETWORK NOT USED TO PROVIDE TELECOMMUNICATIONS

It is well settled that the Department, as an administrative agency, must act strictly within its statutory authority. *Castro v. Viera*, 207 Conn. 420, 428 (1988).

"Administrative agencies are tribunals of limited jurisdiction and their jurisdiction is

²⁹ *Franchise Relinquishment Decision* at 20, 31

³⁰ See Telco's Connecticut Access Service Tariff, Sections 18.2 and 18.6

³¹ *Id.*

dependent entirely upon the validity of the statutes vesting them with power and they cannot confer jurisdiction on themselves.” *Id.* In short, an administrative agency like the Department cannot act “unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation.” *Hall v. Gilbert and Bennett Manufacturing Co.*, 241 Conn. 282, 291 (1997) (citation omitted; internal quotations omitted). As the Department itself has recognized:

Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it ‘It is a familiar principle that a court which exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation.’ *Figueroa v. C & S Ball Bearing*, 237 Conn. 1, 4 (1996), quoting *Castro v. Viera*, 207 Conn. 420, 427-30 (1988). ‘This concept, however, is not limited to courts. Administrative agencies. . . are tribunals of limited jurisdiction and their jurisdiction is dependent entirely upon the validity of the statutes vesting them with power and they cannot confer jurisdiction upon themselves.’³²

Similarly, when it granted SPV’s application to relinquish its franchise, the Department expressly recognized the limits of its jurisdiction with respect to the Telco’s assets stating that it “fully understands [the] limits of the Telco’s legal obligation under federal law to support unbundling and collocation.”³³

The Department’s authority to unbundle derives from the Act – not from Conn. Gen. Stat. §16-247b.³⁴ No provision in the Act provides the Department with jurisdiction

³² *Franchise Application Decision* at 5 (citations omitted) citing *Franchise Application Proceeding*, Decision, May 23, 1996, at 10-11

³³ *Franchise Relinquishment Decision* at 31

³⁴ *AT&T Communications v. BellSouth Telecomms, Inc.*, 238 F.3d 636, 646 (5th Cir. 2001) (citations omitted), see also *MCI Telecommunications*, 216 F.3d at 934, 938 (10th Cir. 2000) (section 252 “allows a state to choose whether it will participate in the Federal regulatory scheme” and, “with the passage of the

to unbundle the Telco's non-telecommunication assets to any person. Section 251(c)(3) only requires the Telco to provide network elements to a carrier for the "provision of telecommunications service." The term network element is defined in §153(29) as a "facility for equipment *used in the provision of telecommunication service.*" (Emphasis added.)³⁵ The Department has already made the factual determination that portions of the HFC network were not used to provide telecommunications. Therefore, based on the federal and state statutes, the Department has no authority to compel the Telco to unbundle those portions of the HFC network that the Department previously recognized were not used to provide telecommunications, which includes all of the coaxial distribution plant. Moreover, Gemini could never prove that its request to unbundle such facilities would meet the necessary and impair standard of §251(d)(2), as the Telco already provides access to its network and end users using existing UNEs that satisfy any legitimate need Gemini has to connect its end user to the Telco's telecommunications network.

The Gemini Petition erroneously states that the "Department itself has already tacitly recognized the HFC network formerly utilized by SPV as a telecommunication network subject to regulation"³⁶ Nothing could be further from the truth. The Department expressly recognized that the coaxial distribution facilities were not used for telecommunications nor part of the telecommunications network when it accepted the

1996 Act, Congress essentially transformed the regulation of regular phone service from an otherwise permissible state activity into a federal gratuity"), *Bell Atlantic - Pennsylvania*, 271 F.3d at 510 ("Because Congress validly terminated the states' role in regulating local telephone competition and, having done so, then permitted the states to resume a role in that process, the state commission's authority to regulate comes from § 252(b) and (e), not from its own sovereign authority")

³⁵ This definition is adopted in Conn. Gen. Stat. §247a(b)(7)

³⁶ Gemini Petition at 9

Telco's allocation of [BEGIN TELCO PARA. 2 PROPRIETARY] [END
TELCO PARA. 2 PROPRIETARY] of the coaxial distribution plant to SPV because it
was not used to provide telecommunication services.³⁷ Moreover, the Department
expressly recognized the limits under federal law to support unbundling.³⁸

In fact, Gemini's entire reliance on the *Franchise Relinquishment Decision* is
completely misplaced because Gemini is not certified to provide video services in the
State of Connecticut. Just as the Department refused to entertain Connecticut
Telephone's request in that docket because Connecticut Telephone did not possess the
requisite CPCN, so the Department must reject any attempt by Gemini to play on the
sympathies of the Department in the guise of a CATV provider. Therefore, Gemini
cannot rely on the Department's statements concerning negotiations for end-to-end
connectivity between the Telco and video service providers.

The federal and state enabling statutes are clear that Gemini is not entitled to any
portion of the HFC network that are not and were not "used to provide
telecommunication services." Therefore, the Department should dismiss the Petition to
the extent that Gemini is asking that the coaxial distribution plant, or any other portion of
the HFC network used solely for CATV services, be unbundled.

³⁷ See fn's 13 and 14 *supra*

³⁸ *Franchise Relinquishment Decision* at 31

VI. IF THE DEPARTMENT DOES NOT DISMISS THE PETITION, ALTERNATIVELY THE DEPARTMENT SHOULD STAY THIS PROCEEDING PENDING THE FCC'S COMPLETION OF ITS TRIENNIAL REVIEW

To the extent the Department determines the unbundling rules apply to Gemini's Petition, which the Telco disputes, the Department should stay any action on Gemini's claims pending the FCC's imminent rulemaking. On December 12, 2001, the FCC initiated a proceeding to "undertake a comprehensive evaluation of [the] unbundling rules." Notice of Proposed Rulemaking, CC Docket No. 01-339, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 16 FCC Rcd 22781, ¶1 (2001). In particular, the FCC has sought in this proceeding – known as the *Triennial Review* – to "ensure that our regulatory framework remains current and faithful to the pro-competitive, market-opening provisions of the 1996 Act in light of our experience over the last two years, advances in technology, and other developments in the markets for telecommunications services " *Id.*

In light of the D.C. Circuit's *USTA* decision vacating and remanding the unbundling provisions of the FCC's *UNE Remand Order*,³⁹ the legitimacy of the current unbundling rules is in serious doubt. While it is true that the D.C. Circuit has stayed its order to vacate the unbundling rules, that stay will expire on February 20, 2003,⁴⁰ the date by which the FCC has committed to releasing its order in the *Triennial Review*

³⁹ Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696 (1999) ("*UNE Remand Order*"), petition for review granted, *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), petition for rehearing denied, *United States Telecom Ass'n v. FCC*, Nos. 00-1012, *et al.*, 2002 U.S. App. LEXIS 18823 (2002), limited stay granted, Order, Nos. 00-1015 and 00-1025 (D.C. Cir. Dec. 23, 2002), petition for cert. pending, *WorldCom, Inc. v. United States Telecom Ass'n*, No. 02-858 (U.S. filed Dec. 3, 2002).

⁴⁰ Order, *United States Telecom Ass'n v. FCC*, Nos. 00-1015 and 00-1025 (D.C. Cir. Dec. 23, 2002).

Proceeding. Whatever the FCC ultimately decides to do in the *Triennial Review Proceeding*, one thing is certain: the old rules of the *UNE Remand Order* will no longer be in effect and the scope and nature of the Telco's unbundling obligations will be governed entirely by the FCC's new order. In light of that, together with the fact that the revised rules will be issued in less than six weeks, if the Department does not dismiss the Petition, it makes absolutely no sense for the Department to proceed to consider Gemini's extraordinary request for unbundled access to an entirely new category of facilities. For the Department to initiate proceedings as suggested by Gemini before even knowing what unbundling standards to apply or what network elements the FCC believes would satisfy such unbundling standards would be extraordinarily wasteful and would accomplish nothing other than protracted litigation over hypothetical questions. And, the very issues that Gemini requests this Department to consider could very well be resolved, or recast, as a result of the FCC's *Triennial Review* order. The Telco respectfully suggests that the Department should avoid applying a test today that will no doubt change in a matter of weeks. At the very least, therefore, the Department should stay this proceeding pending the FCC's completion of the *Triennial Review Proceeding*.

**VII. THE DEPARTMENT SHOULD ISSUE PROCEDURAL ORDERS
BIFURCATING THE ISSUES AND CONTROLLING DISCOVERY TO
ENSURE THAT THE DEPARTMENT AND THE PARTIES DO NOT
WASTE RESOURCES ON ISSUES OVER WHICH THE DEPARTMENT
HAS NO AUTHORITY**

Pending the Department's ruling on the Telco's Motion to Dismiss and the related legal issues,⁴¹ the Department should issue a procedural order bifurcating the issues and

⁴¹ By this suggestion, the Telco does not waive its objection to the Department's jurisdiction in this matter

controlling discovery. Gemini agrees that the matter should be bifurcated with the legal issues considered first.⁴² Therefore, based on the agreement of the parties the Department should issue a procedural order bifurcating the issues. The first phase should address the legal issues related to Gemini's request to unbundle the HFC network, including the Telco's challenges to the Petition and the Department's jurisdiction. The second phase, if necessary, should address any issues that require discovery and an evidentiary hearing, including Gemini's request for a cost study, inventory and a determination of whether Gemini's request is technically feasible and satisfies the necessary and impair standard.

Therefore, pending resolution of the legal issues presented by Gemini's Petition, the Telco should not be ordered to conduct an immediate inventory of the HFC plant. Gemini contends that an inventory is necessary to address the legal issues. Specifically, Gemini alleges that the Department needs to know the specific components of the HFC network as well as the location, number and uses of those components.⁴³ This is just plain silly and underscores the difficulty that the Telco has had throughout the negotiations, which were a frustrating exercise in hide the ball. [BEGIN GEMINI
PARA. 2 PROPRIETARY]

[END GEMINI PARA. 2 PROPRIETARY]

The Department can determine whether Gemini is entitled to the requested unbundling once Gemini complies with the unbundling requirement – identifying what

⁴² Gemini Response to the Telco's January 10, 2003 Response to Gemini's Petition, Jan 13, 2003

⁴³ *Id*

type of facilities, features or functions it requires and how it meets the “necessary and impair” standard. The legal issue is a generic issue that does not require any specifics about numbers or location. The location and number of facilities or condition of the facilities is irrelevant to the legal question of whether the Telco is required to unbundle such facilities, features or functions in the first place. Whether the Telco has coaxial cable between Pole 1 and Pole 2 is totally irrelevant to the generic question of whether the Telco is required to unbundle coaxial cable that is not used for telecommunications. Whether the Telco has fiber between point A and point Z is totally irrelevant to the question of whether the Telco’s existing UNEs satisfy the requirements of Gemini or whether the Telco is required to unbundle fiber generically. First, a carrier submits to the Telco a bona fide request for a new UNE that specifically describes the portions of the Telco’s network and the features and functions that it desires, which are then negotiated into a new interconnection agreement or added to an existing interconnection agreement. Then and only then does the carrier specify how many and where it wants the generic UNE. Prior to that time, the Telco is under no obligation to disclose information as to where specific UNEs are available.⁴⁴ If a dispute arises, the Department, consistent with the FCC’s rulings, then decides whether a generic request for a UNE satisfies the legal requirements of the Act and Conn. Gen. Stat. §247b(a). Therefore, the Department should issue a procedural order that the Telco is not required to provide an inventory until after the issue of what if anything must be unbundled is determined.

⁴⁴ Because the Department may determine that Gemini is not entitled to some or all of the UNEs that it is requesting, portions of the inventory of the HFC plant may be wholly irrelevant to this proceeding. In that case, there is no reason for any person to have access to any information about those portions of the plant. Nor is there any reason for the Telco to be required to expend the time and expense required to prepare such an inventory.

The question of whether Gemini is entitled to the requested unbundling is a pure legal question. Therefore, the Department should issue a procedural order stating that the matter will be handled by briefs, without the need for any discovery or evidentiary hearings. In the alternative, the Department should limit discovery in phase one only to matters directly related to the legal issues presented, specifically excluding any discovery related to an inventory of the HFC plant.

VIII. CONCLUSION

The Department cannot achieve the goals stated in Conn. Gen. Stat. §16-247a by ignoring the federal statutory scheme required for the negotiation and arbitration of disputes concerning UNEs. Yet, that is precisely what Gemini's Petition requires the Department to do.

As demonstrated above, the Department does not have the jurisdiction to effect or order the unbundling of the "entire HFC network," portions of which the Department has already determined were not used to provide telecommunications. Nor does the Department have jurisdiction to entertain this untimely and incomplete request to arbitrate a dispute, which the Petition admits arises under negotiations conducted pursuant to §§251 and 252 of the Act. Even if the Department had jurisdiction, it would have to dismiss the Petition, as untimely, inconsistent with federal law, inadequate on its fact, and moot.

For these reasons and the reasons set forth in this Motion, the Department should dismiss the Petition. In the alternative and, at a minimum, the Department should stay this proceeding pending the FCC's decision by February 20, 2003 in the *Triennial Review Proceeding*, as some or all of the issues raised by the Petition may become moot, or at the

very least, the Department's role in unbundling the telecommunications network will be clarified.

If the matter is permitted to proceed, the Department should issue a procedural order to: (1) require Gemini to amend the Petition to identify (a) the features and/or functions of "the entire HFC network" that it seeks to unbundle, (b) how the requested UNE will be used for interconnection and/or access to the local telecommunications network, and (c) why the existing UNEs offered by the Telco do not satisfy Gemini's needs; (2) bifurcate the proceedings into two phases with only the legal issues addressed in phase one and Gemini's request for a cost study and inventory addressed in phase two; (3) order that phase one, which only addresses legal issues, does not require any discovery or hearings, but will be resolved based on briefs submitted by the parties; (4) if any discovery is permitted in phase one, limit discovery to information specifically required to resolve the legal issues; and (5) deny Gemini's request for any inventory in phase one as unnecessary to the resolution of the legal issues of whether unbundling is required, deferring such discovery until phase two.

Respectfully submitted,

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